

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

_____	)	MDL No. 1456
IN RE PHARMACEUTICAL INDUSTRY	)	Master File No. 01-12257-PBS
AVERAGE WHOLESALE PRICE LITIGATION	)	
_____	)	Judge Patti B. Saris
	)	
THIS DOCUMENT RELATES TO:	)	
State of California, <i>ex rel.</i> Ven-A-Care v.	)	
Abbott Laboratories, <i>et al.</i>	)	
03-cv-11226-PBS	)	
_____	)	

PLAINTIFFS' SUR-REPLY TO Z.L.B. BEHRING'S SEPARATE  
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Respectfully submitted,  
BILL LOCKYER  
Attorney General for the State of California

Dated: April 17, 2006

By: /s/ Nicholas N. Paul  
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**Attorneys for *Qui Tam* Plaintiff,  
VEN-A-CARE OF THE  
FLORIDA KEYS, INC.**

**DISMISSAL OF THE BLOOD FACTOR  
ALLEGATIONS SHOULD BE WITHOUT PREJUDICE**

Defendant Z.L.B. Behring's (Behring's) separate motion to dismiss is based on Rule 9(b) of the Federal Rules of Civil Procedure (*i.e.*, failure to plead with particularity), given that no list of blood factor drugs was included in the exhibits attached to the First Amended Complaint (FAC). Plaintiffs concurred with Behring's contention and withdrew their *blood factor claims*, as alleged in paragraphs 56 and 57 of the FAC. Plaintiffs did not, and do not, withdraw any other claims against Behring, *i.e.*, their immune globulin claims.

In adjudicating a Rule 9(b) challenge, a court ordinarily should grant dismissal without prejudice and with leave to amend to cure deficiencies in pleading fraud, unless the defect is not curable by amendment or plaintiff failed to plead with particularity after repeated opportunities. "Failure to plead fraud with particularity likewise does not support a dismissal with prejudice. To the contrary, leave to amend is 'almost always' allowed to cure deficiencies in pleading fraud." *Firestone v. Firestone*, 76 F.3d 1205, 1209 (1996)(quoting *Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir.1986), citation omitted); *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)(same).

Here, no factors are asserted by Behring which compel dismissal with prejudice. Plaintiffs withdrew their claims because they did not identify the specific blood factor drugs which are the subject of the allegations of the complaint, and this oversight can be cured.

**PLAINTIFFS' CLAIMS AGAINST BEHRING'S IMMUNE GLOBULIN PRODUCTS (IVIG) ARE PROPERLY PLED, BUT ARE ADDRESSED IN PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT IN INTERVENTION**

Plaintiffs' opposition to Behring's separate motion to dismiss does not address the allegations regarding Behring's IVIG products. Plaintiff's argument is stated with their Opposition to Defendants' Joint Motion to Dismiss, wherein Plaintiffs assert they properly pled all allegations concerning the drugs identified in Plaintiffs' sealed exhibits, which include Behring's IVIG products (FAC, exh. B.)

**CONCLUSION**

For the reasons stated herein, Plaintiffs request that the Court dismiss the blood factor allegations alleged in the FAC (¶¶ 56, 57) without prejudice, and with leave to amend.

**CERTIFICATE OF SERVICE**

I, Nicholas N. Paul, hereby certify that on April 17, 2006, I caused a true and correct copy of the foregoing, **PLAINTIFFS' SUR-REPLY TO Z.L.B. BEHRING'S SEPARATE MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** to be served on all counsel of record via electronic service pursuant to Paragraph 11 of Case Management Order No. 2, by sending a copy to LexisNexis File & Serve for posting and notification to all parties.

Dated: April 17, 2006

/s/ Nicholas N. Paul  
NICHOLAS N. PAUL  
Supervising Deputy Attorney General